

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 14, 2009

IN RE D.L.G.

**Appeal from the Circuit Court for Sumner County
No. 30882-C C.L. Rogers, Judge**

No. M2009-00944-COA-R3-PT - Filed November 13, 2009

Incarcerated father appeals the trial court's termination of his parental rights, arguing that the termination was not in the best interest of the child. Because the trial court's determination is supported by clear and convincing evidence, we affirm the trial court's decision.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Lawren B. Lassiter, Gallatin, Tennessee, for the appellant, W.C.

J.G.W., Pro Se.

D.L.W., Pro Se.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

J.G.W. ("Mother") and W.C. ("Father") had a brief romantic relationship in 2003. Shortly after Mother discovered that she was pregnant, the relationship ended. In July 2004, Mother gave birth to a son, D.L.G.

Prior to the relationship between Mother and Father, Father was charged with crimes against a former girlfriend, and in February 2004, he pled guilty to domestic assault and rape and received a ten-year sentence, which he began serving in March 2004. Thus, Father was in prison when D.L.G. was born. By that time, Mother was in a new relationship with D.L.W., whom she later married.

Shortly after D.L.G.'s birth, Father initiated proceedings to establish parentage and to set child support and visitation. Father was confirmed as the child's biological father, and Father began

paying small amounts of child support out of monies he generated while in prison. Mother and the paternal grandparents began arranging visitation between the grandparents and D.L.G. Around March of 2005, Mother and the paternal grandparents went to the prison in west Tennessee so that Father could see the child for the first time. From that time until about March of 2007, the paternal grandparents took the child to see Father in prison on a total of eight to ten occasions.

In December 2007, Mother and her new husband, D.L.W., filed a petition to terminate Father's parental rights, citing as grounds Tenn. Code Ann. § 36-1-113(g)(6), which provides for the termination of parental rights if the "parent has been confined in a correctional or detention facility of any type, by order of the court as a result of a criminal act, under a sentence of ten (10) or more years, and the child is under eight (8) years of age at the time the sentence is entered by the court." Father filed an answer in opposition to the petition. Father filed a motion requesting visitation or, in the alternative, grandparent visitation for the paternal grandparents. In April 2008, the court set visitation for the paternal grandparents and denied Father's request for visitation pending a full hearing or further court order. In May 2008, Mother's termination petition was amended to include a petition for adoption by D.L.W., who had then returned from a military deployment.¹ The court appointed an attorney for Father and a guardian ad litem for D.L.G.

The case was tried on April 1, 2009. The court heard testimony from Mother, Father, the guardian ad litem, the stepfather (Mother's husband), the stepfather's mother, Mother's sister, Father's adult son, and the paternal grandparents. Father testified that he had sent D.L.G. numerous cards and poems and had even made a model boat for him. He also talked with D.L.G. over the telephone when D.L.G. was visiting with the paternal grandparents. Mother's sister testified about an incident she observed when Father hit Mother's five or six-year-old sister. There was some testimony from members of Father's family that D.L.G. had referred to Father as "Daddy" or "Broken-Legged Daddy."² Father's adult son testified that D.L.G. sometimes mistook him for Father. The guardian ad litem recommended termination of Father's parental rights.

The court entered an order finding grounds for termination, that termination was in the best interest of the child, and approving the adoption by D.L.W.³ In its order, the court found that "Father has had insignificant contact over the last 5 years with the child" and that "the child does not recognize the biological Father as his Father based on the evidence." The court also found that "[t]he Step Father has been a father [to D.L.G.] in every way beginning in the birthing room all the way through the present" and that D.L.G. "always referred to the Step Father as his Father or Dad." The court concluded that the statutory factors "clearly and convincingly support termination of parental

¹ The paternal grandparents filed an intervening petition in June 2008 asking the court to allow them to maintain a relationship with the child until Father was able to have the child in his home. The rights of the grandparents are not at issue in this appeal.

² Father had a broken leg at the time of one of D.L.G.'s visits at the prison.

³ The court also granted visitation to the paternal grandparents.

rights herein as being in the best interest of the child.” Mother’s motion to alter or amend, which the court granted in part and denied in part, is not relevant on appeal.

Father appeals the termination of his parental rights.

STANDARDS FOR TERMINATION OF PARENTAL RIGHTS

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)). Terminating a person’s parental rights “has the legal effect of reducing the parent to the role of a complete stranger.” *In re W.B., IV*, No. M2004-00999-COA-R3-PT, 2005 WL 1021618, at *6 (Tenn. Ct. App. Apr. 29, 2005). Pursuant to Tenn. Code Ann. § 36-1-113(l)(1), “[a]n order terminating parental rights shall have the effect of severing forever all legal rights and obligations of the parent or guardian of the child against whom the order of termination is entered and of the child who is the subject of the petition to that parent or guardian.”

Our termination statutes identify “those situations in which the state’s interest in the welfare of a child justifies interference with a parent’s constitutional rights by setting forth grounds on which termination proceedings can be brought.” *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). To support the termination of parental rights, petitioners must prove both the existence of one of the statutory grounds for termination and that termination is in the child’s best interest. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Because of the fundamental nature of the parent’s rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence “establishes that the truth of the facts asserted is highly probable, and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004) (citations omitted). Such evidence “produces in a fact-finder’s mind a firm belief or conviction regarding the truth of the facts sought to be established.” *Id.*

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *Id.* at 654. As to the trial court’s findings of fact, our review is de novo with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

ANALYSIS

A party seeking termination of parental rights must prove two elements by clear and convincing evidence: the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re M.L.P.*, 281 S.W.3d 387, 392 (Tenn. 2009); *In re Valentine*, 79 S.W.3d at 546; Tenn. Code Ann. § 36-1-113(c). In the present case, Father does not challenge the trial court's finding that there was a statutory ground for termination, namely Tenn. Code Ann. § 36-1-113(g)(6). Father does, however, take issue with the trial court's best interest determination.

In making a determination as to whether termination was in the best interest of the child, the trial court was required to consider the non-exclusive list of factors set out in Tenn. Code Ann. § 36-1-113(i):

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Ascertaining whether termination is in a child's best interest is necessarily a fact-intensive inquiry. *In re Giorgianna H.*, 205 S.W.3d 508, 523 (Tenn. Ct. App. 2006). Moreover, the best interest analysis "does not call for a rote examination of each of Tenn. Code Ann. § 36-1-113(i)'s nine factors and then a determination of whether the sum of the factors tips in favor of or against the parent." *In re Audrey S.*, 182 S.W.3d 838, 878 (Tenn. Ct. App. 2005). Rather, "[t]he relevancy and weight to be given each factor depends on the unique facts of each case." *Id.*

In terminating Father's parental rights, the court made several factual findings pertinent to the best interest inquiry. The trial court noted the "insignificant contact" between Father and D.L.G. and found that the child did not recognize Father and that the stepfather was the only Father D.L.G. had ever known. The court further found that D.L.W. had done an admirable job of acting in a paternal role toward D.L.G. and offering the child a stable home. Because of his imprisonment, Father was unable to make adjustments to allow the child to safely live with him or to provide the child with significant child support. The court essentially found that there was no meaningful relationship between D.L.G. and Father and that D.L.W. was the person recognized by the child as his father.

Father challenges several of the trial court's factual determinations. He takes issue with the trial court's statement that, during Mother's pregnancy, "Father chose not to be involved or provide support prior to his guilty plea." Father emphasizes that, after their relationship ended and before his imprisonment, Mother chose to have minimal association or communication with him and did not ask for his help. Regardless of Mother's conduct, however, the evidence does not preponderate against the trial court's finding that Father did not assist Mother financially during her pregnancy. Moreover, we do not consider this finding significant in the court's best interest analysis.

Father takes issue with the trial court's finding that D.L.G. did not recognize Father as his father, citing testimony that the child had referred to him as "Daddy." The record contains conflicting evidence on this issue. Especially in light of testimony that D.L.G. sometimes thought that Father's adult son was Father, we cannot say that the evidence preponderates against the trial court's finding that D.L.G. did not recognize Father as his father.

Father also argues that the trial court erred in finding that he had insignificant contact with the child. In making this argument, Father asserts that he did everything in his power to establish a meaningful relationship with his son within the limitations imposed on him due to his imprisonment and Mother's decision to stop allowing his visits in March 2007. Father did initiate parentage proceedings and paid small amounts of child support out of his prison earnings. He introduced evidence that he sent D.L.G. many cards and gifts and testified that, during his last visit with his son in March 2007, the child told Father that he loved him. Father also cites evidence that he visited with the child ten times, rather than the eight times cited by the trial court. As Father points out, his efforts to establish a relationship with his son exceed those made by some other

incarcerated parents in termination cases that have come before this court. *See In the Matter of G.L.T.*, M2008-00582-COA-R3-PT, 2008 WL 3914922, at *6 (Tenn. Ct. App. Aug. 25, 2008) (father had never seen or met child and had no relationship with child); *In re Marr*, 194 S.W.3d 490, 500 (Tenn. Ct. App. 2005) (father had not seen child in over five years and paid far less support than he could have).

While Father's efforts are commendable, the best interest determination requires the court to focus on the child's perspective. *See In re Giorgianna H.*, 205 S.W.3d at 523; *In re Marr*, 194 S.W.3d at 498; *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004). The court found that no meaningful relationship existed between Father and D.L.G. and that the stepfather had acted as D.L.G.'s father figure throughout his life. We must also note that the record contains evidence that Father pled guilty to a brutal crime against a former girlfriend, made threats of violence against Mother after their relationship ended, and had exhibited cruel behavior toward children.⁴ There is clear and convincing evidence to support the trial court's determination that, under the circumstances of this case, it is in the best interest of D.L.G. to terminate Father's parental rights.

The decision of the trial court is affirmed. The costs of this appeal are assessed against Father, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

⁴There was testimony about an incident when Father hit Mother's young sister and knocked out two of her teeth; there was testimony about Father's hanging a young child by his jacket on a nail to teach him a lesson.